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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 85.

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; ET AL., PETITIONERS-APPELLANTS,

v.

UNITED STATES OF AMERICA, PLAINTIFF-RESPONDENT,

and

PARAMOUNT PICTURES, INC., ET AL., DEFENDANTS-RESPONDENTS.

No. 79.

The United States of America, Appellant,

v.

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, et al.

No. 80.

Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants,

v.

The United States of America.

No. 81.

Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants,

v.

The United States of America.

No. 82.

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants,

v.

The United States of America.

No. 83.

United Artists Corporation, Appellant,

v.

The United States of America.

No. 84.

Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures Company, Inc.), et al., Appellants,

v.

The United States of America.

BRIEF OF AMERICAN THEATRES ASSOCIATION, INC., ET AL.

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TABLE OF CONTENTS.

Page

CASES.

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OPINIONS BELOW.

The opinions delivered in the court below from which the appeal in No. 85 is taken are reported in 66 F. Supp. 323 and 70 F. Supp. 53. The petition to intervene in Nos. 79-84 is an original petition now pending before this Court.

GROUNDS OF JURISDICTION.

The appeal in No. 85 is taken pursuant to 15 U. S. C. § 29. The original petition to intervene in this Court is based on *U. S.* v. *Terminal Association of St. Louis*, 236 U. S. 194.

STATEMENT OF THE CASE.

American Theatres Association, Inc., Southern California Theatre Owners Association, and a number of exhibitors of motion pictures, have appealed from the decision of the District Court denying its right to intervene in that court and from the provisions of Part II, Paragraph 8, of that court's decree of December 31, 1946, instituting a system of competitive bidding for the distribution of motion picture films. They have also filed an original petition in this Court to intervene in Nos. 79-84 for the purpose of presenting their objections to the provisions relating to competitive bidding.

In Part II, Paragraph 8, of the decree of December 31, 1946, defendants are enjoined as follows:

> 8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:
>
> (a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;
>
> (b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;
>
> (c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competi-

tive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

Our principal objections go to sub-Paragraph (c) of the injunction quoted above.

QUESTIONS PRESENTED.

A. Did the court below err in refusing to grant appellants intervention as of right?

B. Should this Court grant appellants' intervention as of right in Nos. 79-84?

C. Is the requirement of auction bidding imposed by the court below an invalid exercise of that court's power?

ARGUMENT.

I.

THE STANDING OF APPELLANTS TO INTERVENE AND TO MAINTAIN THIS APPEAL.

The standing of American Theatres Association, Inc., et al, to intervene in the court below and to take this appeal has been questioned by a motion to dismiss, the determination of which has been postponed to the hearing on the merits (——— U. S. ———, 67 S. Ct. 1752).

The motion for leave to intervene was brought under Rule 24 (a) of the Federal Rules of Civil Procedure which provides that "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" there shall be intervention of right.[1] The following cases support intervenors' right to appeal from the order denying their motion to intervene:[2]

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[1] Said Rule 24 (a) reads as follows:

> "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

[2] See also *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173; *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707.

Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502;
U. S. v. *Terminal Assn. of St. Louis*, 236 U. S. 194;
Brotherhood of Railroad Trainmen v. *Baltimore & Ohio Railroad Company*, —— U. S. ——, 67 S. Ct. 1387. Decided June 9, 1947;
Wolpe v. *Poretsky*, 144 F. 2d 505.

Rule 24 (a) providing for intervention of right applies to the situation of the appellant-intervenors for the following reasons: Intervenors include both associations of motion picture theatres and individual motion picture exhibitors. They are compelled to buy the pictures produced by the defendants in order to stay in business because, as the court found, these defendants distribute over 70% of the feature films. The section of the decree from which we appeal (Section 8 (c) of Part II) authorizes and requires these major distributors to engage in a preconceived program of uniform and concerted action which regulates and controls the selling of films to appellant-intervenors, and restricts the independent competitive activity which any one of the major distributors would otherwise be free to take.

It is obvious that if the defendants themselves undertook to combine in order to carry out the preconceived plan of uniform and concerted action suggested by the court in order to control the market for film, any one of the appellant-intervenors would have a remedy against the major distributors under the antitrust laws. In other words, the Court is attempting to legalize an otherwise illegal plan for concerted action to regulate the market for films. Appellant-intervenors are more than incidentally affected by the decree. It takes away their existing legal remedies against concerted action by those who dominate the market. The decree if affirmed will, therefore, be binding on them as a matter of law.

As the Court said in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co., supra*, at 1390:

"Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene

where intervention is a permissive matter within the discretion of the Court. United States v. California Co-op. Canneries, 279 U. S. 553, 556, 49 S. Ct. 423, 424, 73 L. Ed. 838. *The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case.* He is at liberty to assert and protect his interests in some more appropriate proceeding." (Emphasis supplied.)

The other cases cited above go even further than required to support appellant-intervenors' right to intervene and appeal. For example, in *U. S.* v. *Terminal Association of St. Louis, supra,* this Court said that third parties were entitled to be heard on intervention in connection with an antitrust decree "insofar as it might operate prejudicially to their rights." In *Missouri-Kansas Pipe Line Co.* v. *U. S., supra,* the Court said "But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion."[3]

The inadequacy of the representation of the interest of appellant intervenors is equally clear. Some mild dissent to the plan has been voiced by the defendants, but it can scarcely be argued that appellant intervenors' interests are adequately represented by those found guilty of conspiring to discriminate against them. The government which is the natural party to protect appellant intervenors has not only voiced no objection but actually indicated its willingness to try out the plan.

Further, no proof has been introduced into this record showing the economic problems with which independent exhibitors are confronted in the licensing of motion pictures.

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[3] *Cf. Evens & Howard Fire Brick Company, et al.* v. *United States,* 236 U. S. 210; *United States* v. *California Co-operative Canneries,* 279 U. S. 553, 556.

The absence of any such proof in this record would seem to show beyond peradventure of a doubt that the interests of exhibitors have not been adequately represented in this case, thus making obvious the right of intervention which is here being sought.

II.

OUR STANDING ON OUR PETITION FOR DIRECT INTERVENTION IN THIS COURT.

Appellant intervenors have also filed a petition for intervention in this Court conforming exactly to the precedent set by *U. S.* v. *Terminal Association of St. Louis,* 236 U. S. 194, 199. That case held that third parties were entitled to be heard by intervention in this Court concerning the settlement of an antitrust decree "insofar as it might operate prejudicially to their rights". Here, as we have shown, the decree below approving an otherwise illegal combination has cut off appellant intervenors' legal right to proceed under the antitrust laws against such a combination as effectively as the legal rights of the intervenors were cut off in the *St. Louis Terminal* case.

III.

THE REQUIREMENT OF AUCTION BIDDING IS AN INVALID EXERCISE OF THE COURT'S POWER AND WILL, IF ENFORCED, CAUSE IRREPARABLE INJURY TO APPELLANT INTERVENORS AND ALL OTHER INDEPENDENT EXHIBITORS OF MOTION PICTURES.

A. The Failure of the Decree to Accomplish the Purpose the Court Intended.

The purpose of the lower court in setting up competitive bidding for films is clear from the opinion. It had found a number of discriminatory and restrictive practices on the part of the defendant producers and distributors and their exhibitor affiliates which were directed against inde-

pendent exhibitors. It desired to prevent this discrimination without at the same time requiring divestiture of the defendants' theatres. The court apparently thought that if everyone were given a chance to bid and films were sold in no other way than by auction bidding discrimination would be impossible.

The court of course could not give direct orders to the independent exhibitors who were not parties as to how they should buy. It could nevertheless control this buying by controlling the defendants who produced over 70% of the feature films. Since no exhibitor can survive without buying a major portion of his product from these defendants, an order against them can in practical effect substantially control and regulate not only the defendants but also the exhibitors who had no voice in these proceedings. The court took advantage of this situation to impose judicial regulation over the entire industry. Its decree affects appellant intervenors in the following way:

1. It compels the buyers in the market for films to submit to market regulations formulated by the court and enforced by the concerted action of sellers who control the major part of the supply.

2. It takes away from appellant intervenors their former right to enjoin such concerted action on the part of the defendants.

3. It takes away from appellant intervenors their former right to recover damages under the antitrust laws on a showing that the operation of the plan has caused them injury.

4. It authorizes and compels the major distributors to break off established relationships with independents which have no taint of illegality whatever.

No doubt, the court was moved by the belief that the limited type of competition involved in enforced auction bidding would be fairer than uncontrolled free competitive activity. But this is an economic judgment which the court had no power to make. Congress has not, and in-

deed it could not, delegate the broad power to make competition fairer by restricting competitive activity. *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

Not only was the economic judgment of the court invalid as a matter of law; it was equally faulty as a practical solution for the evils existing in the industry. Instead of decreasing the monopoly power of the defendants it increases it. Instead of putting independents in a better bargaining position it leaves them worse than they were before. The primary impact of the decree is not upon the defendants who receive the bids but upon the independents who are required to bid against one another. If auction bidding were possible or appropriate in this industry—which we do not believe—the court's purpose could be carried out only by compelling the *defendants* to bid against each other for the playing time of independent exhibitors. Only in this way could mandatory auction bidding operate against the wrongdoers and in favor of their innocent victims. The decree will in practice be a requirement that independent exhibitors struggle and compete among themselves for the scarce supply of pictures produced and controlled by a few industrial giants.

An illustration from another field may be helpful. Sometime ago, great financial houses in New York, of which Morgan Stanley was a leader, effectively controlled the underwriting of utility securities. The utility companies had little bargaining power in the sale of their own securities. Financial houses which had a special position with the various utilities absolutely determined which houses would purchase or underwrite the securities; the prices at which they would be sold; the spreads or profits to the banking houses, etc. For the purpose of correcting these abuses competitive bidding was made mandatory. But the persons who were guilty of the restraints—the banking houses—were required to compete among themselves for the securities, and the victims—the utility companies—were the beneficiaries of the higher prices and better terms

which were obtained by the competitive bidding. The remedy in that situation was adapted to the evil; and the persons upon whom the impact of the regulation was most severe were the persons whose restrictive practice came under governmental condemnation. Cf. Rule U-50, S. E. C., and *Morgan Stanley & Co.* v. *S. E. C.*, 126 F. 2d 325 (C. C. A. 2d, 1942).

Competitive bidding is not new. It has been tried before in many contexts. But it has always been used as a device to protect the recipient of the bids against the bidders. Thus, competitive bidding on government projects is designed to prevent the Government from being imposed on by the bidders. And this is true whether it is the disposal of surplus property owned by the Government or the procurement of property by the Government. It is the Government which receives the bids. Thus, to take contrasting examples, when the purchasing agent of the Treasury asks for sealed bids for a specified number of automobile tires, he is trying to secure the requisite supply as cheaply as possible. And when the War Assets Administration attempts to dispose of a lot of automobile tires by auction sale, it is attempting to secure as high a price as possible. The present proposal is the first which has come to our knowledge which attempts to protect a weaker party by requiring the weak to bid against the weak for the favor of the strong.

As applied to the motion picture industry the effects of the practice stand out sharply. The exhibitors, by competing against each other, bid up the price of the rights which are being sold. The producer-distributors, by calling for the bids, attempt to extract from each license all the traffic can be made to bear. The scheme moves towards raising the floor under prices rather than lowering the ceiling over them. It is a device which obtains for the already powerful producers a price which is the utmost the weaker exhibitor can be made to pay.

The practices of the defendants which have been attacked before this Court are monopolistic and discriminatory

practices designed primarily to aid and promote the theatre interests which are owned or controlled by the defendants. The Court has not seen fit to decree dissolution of the defendants' ownership of theatres. On the propriety of this decision, these intervening petitioners take no position and make no suggestions. But we do insist that the alternative selected by the court is neither appropriate nor permissible. It assures the very instruments of monopoly—the theatres owned or controlled by defendants—a basic supply of pictures and at the same time deprives the independent exhibitor of any possibility of securing for himself by orderly and historic negotiations and contract arrangements the supply of pictures which he needs.

B. Auction Bidding in the Motion Picture Industry Will Not Restore Free Competition But Will Lead to Its Further Destruction.

1. *The purposes of the Sherman Act.*

The Sherman Act, under which this suit was brought, has been declared by Mr. Chief Justice Hughes to be a "charter of freedom." See *Sugar Institute, Inc.* v. *U. S.*, 297 U. S. 553, 600 (1936). In specific terms it seeks to outlaw every monopoly, and every contract, combination, and conspiracy in restraint of trade. Its aim is to impose a legal ban upon economic tyranny, to prevent the domination of the weak by the strong, to insure to industrial rivalry a fair field and no favors, to put an end to industrial vassalage in all its forms. It is, as Mr. Justice Stone has put it, the very "power" to fix prices, to dictate the terms of the bargain, to compel a result which could not be won in fair mercantile battle which is the test of restraint. See *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). See also *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

These are the general objectives of public policy in this litigation to be realized, within the concrete operation of the motion-picture industry, by protecting independent exhibitors and breaking the hold of the combination by the defendants. In its desire to prevent discrimination in the sale of feature pictures, the Court below has, we contend, unwittingly suggested a form of decree which will not meet the purposes of the antitrust laws because it will not and cannot create an open market in the distribution of pictures. It will rather increase the monopoly power of the defendants and weaken the position of the independent exhibitor.

2. *The relation of Bidding to Competition.*

There is a deceptive assurance in the resort to auction bidding. It is based on the assumption that competition is created where open bidding is required. Actually competition and auction bidding are not identical. In most situations they have little relationship with each other. The ordinary purpose of competitive bidding is to prevent a person in a fiduciary capacity from favoring some individual contractor to the detriment of the public or the persons whom he represents. The device is a safeguard to prevent persons who act, not for themselves, but for others from betraying their trust.

But this is as far as it goes. It does not of itself—and cannot—create a competitive market. It has in practice repeatedly proved itself to be an invitation to collusion among the parties from whom bids are sought. The large cigarette companies have for years been accustomed to use the auction market to depress the price paid to the growers for leaf tobacco. *American Tobacco Co.* v. *U. S.*, 147 F. 2d. 93, aff'd. 328 U. S. 781. The federal government has complained to the courts that on numerous occasions the bids submitted to it were collusive bids. *U. S.* v. *Cooper Corporation*, 312 U. S. 600. And the State of Georgia, voicing similar allegations, has been permitted to go into court to seek triple damages. *Georgia* v. *Evans*, 316 U. S. 159.

Auction bidding does not in any way remove the handicap of those bidders who are in an inferior bargaining position.

3. *The Inequality of Bargaining Power between the Defendants and Independent Exhibitors.*

In the situation before the Court we are faced with a gross inequality in bargaining position. The defendants have great economic power. The exhibitors are largely weak and unorganized. This inequality is aggravated by the fact that exhibitors must buy in a seller's market where the amount of product is declining and the demand for it greater than the supply.

Furthermore, the tendency in the industry as it is now organized is toward even greater scarcity. As the record of this case shows, the business of producing motion pictures is not open to all who wish to take its chances. It requires large capital but more important is the fact that newcomers may expect to have great difficulty in distributing their product because of the present producer control of distribution.

The effect is apparent from the production figures. In 1937 a year of depression when purchasing power was low some 437 pictures were released by all producers. In the season 1945-46, a year of tremendous purchasing power and packed houses, only 445 pictures were released by all producers which in no way caught up to the increased demand. In the comparable season of 1946-47 the pictures released were reduced to 426. As is pointed out in the brief amicus curiae submitted on behalf of the Conference of Independent Exhibitors Associations the Court's findings do not reflect the gradual reduction in the number of films annually released by the defendants. This brief goes on to say:

> "Finding No. 99 shows that during the 1943-1944 season the eight defendants together released 260 feature films, exclusive of 'westerns.' The affiliated first-run and key neighborhood theatres by reason of extended

runs (a 'smash hit' will sometimes be held over for three or four weeks) and move-overs, do not require as many feature pictures as the independent subsequent-run and small town theatres. Theatres of the latter class commonly change their programs two or three times a week, thus requiring from 104 to 156 features a year. Most of them are compelled by competitive conditions or custom to show double features; that is two feature pictures on every program. And in many instances the exhibitor must split the available product with a competitor having the same run.

"It is apparent, therefore, that so far as the independent subsequent-run and small town theatres are concerned, there is a serious product shortage."

Under these circumstances the freedom of the exhibitor to shop around and to deal with the major producers on any sort of an equal bargaining basis is severely limited. He must, whatever his run—first, move-over, second, third, revival or nondescript—depend for his "features" upon a small number of major companies which in the near past, as the court below has found, have been operating in close accord. The major companies, however, are under no such compulsion to deal. However indispensable they are to the exhibitors, the patronage of no exhibitor is indispensable to any one of them. The conditions under which competition insures a "charter of freedom" do not—and under the Court's decree as now written—cannot prevail in the motion-picture industry. Within the framework of such a situation competitive bidding will perpetuate the very inequities it is meant to correct.

For the belief that auction bidding will itself break restraints revealed in this litigation there is neither warrant or authority. Competitive bidding instead of removing the coercive use of power by the defendants will force the weaker units of the industry into ruinous competition with each other. It will not compel competition among the sellers except when they are dealing with large chains of exhibitors. This means the progressive elimination of in-

dependent exhibitors. The decree will thus defeat rather than correct the objectives which it is invoked to secure.

4. Auction Bidding Will Strengthen the Defendants' Monopoly Position and Weaken the Position of Independent Exhibitors by Destroying Existing Relationships.

Examination of the consequences of the decree in operation make it clear that what was intended by the court below as a system to protect the exhibitor against the massed economic power of the distributor-exhibitor defendants will instead be a weapon in the hands of the distributor-exhibitor defendants for further concentration of power and monopolization of the industry to the detriment of the independent exhibitor.

Independent motion picture exhibitors operating one or two theaters seek, need, and desire, just as any other merchant, a known supply or inventory of products upon which they can rely as the need for it arises. Thus if he were permitted to buy a season's supply of product from producers, the quality of whose product is generally known, this need would be substantially met. Having thus acquired the right to needed product upon terms settled in advance as to playing, position, clearance, source, run and the like, the independent exhibitor could then proceed to devote himself to the more efficient operation of his theater and to those qualities of showmanship which constitute the very heart of his business. As a result of the present litigation an independent exhibitor's right and opportunity to so operate his theater and his business has been completely removed.

The only existing restraints upon the monopoly pressure of the major defendants to absorb all exhibition into their orbit are: (1) The moral pressure of long established business relationships and the condemnation of the business community which would result from disruption of such relationships; and (2) the threat of prosecution under the antitrust laws. The decree requiring auction selling will remove

both these obstacles to complete monopoly. Auction selling specifically requires disregard of established business relationships. *Cf.* the decree below II(8)(b) and II(8)(c). Taking product away from independents by use of buying power and high bids in accordance with the Court's decree would carry out the monopoly objectives of the defendants but the decree would effectively immunize them against prosecution or civil suit under the antitrust laws.

The present status of the industry involves many situations in which independent exhibitors and independent chains have, by long custom, been able to find partial shelter from the monopolistic practices of the defendants. They have made arrangements with the defendants which assure them of a continuous supply of product sufficient to operate their theatres. Many of them have suffered serious disadvantages as a result of the restraints imposed by the defendants, but they have so far been able to operate. Instead of freeing them from the restraints now in existence the proposed form of sale of film would result in destroying whatever stability remains in the industry. An independent theatre with established sources of supply cannot, under the decree, insist on the continuance of those sources of supply. It is at the mercy of the economic power of its competitors to cut off that source of supply or to buy up the most desirable film. This is true particularly where the competition is a theatre owned by the defendants. It may be true to a lesser extent where the competition is that of a stronger chain or other independent. (See infra, p. 19.)

It is true that at present established business relationships do not constitute an assurance of a continued supply of products. However, they have the sanction of the mores of the industry and, should those fail, are reinforced by the sanction of the antitrust laws. Thus, should a defendant company now attempt to deprive a competing independent first run theatre of its product by interfering with its established business relations, there is no question that an

antitrust suit could be successfully prosecuted to restrain the practice and for damages. Thus, business mores and the antitrust laws have combined to permit the independent exhibitor to continue operation under serious disadvantages as a result of defendants' restraints but nevertheless to continue in business. Under the proposed decree the defendants would not only not be restrained from attempting to take desirable product away from independent competitors, they would be encouraged to do so. Distributors supplying independents would now be required under the decree to attempt to sell their product to defendant-owned theatres if such threatres should outbid the independent; and if complaint were made that the defendants were enhancing their monopoly by use of the competitive bidding process, there would be available to them the defense that what they have done is sanctioned if not compelled by court decree.

Thus what has been an illegal conspiracy imposing restraints on independent exhibitors will now operate openly and with full sanction of law. The result will be deterioration of the position of the independent exhibitor. An assured supply of product and economic power will tend to make defendant-owned theatres or large chains the only theatres which can operate at a profit under the bidding system. A situation will be created in which a theatre operating as an independent is unprofitable while, if owned by a defendant or a large chain, it would prove to be a valuable money making property. Competitive bidding is not, as the Court supposed, a method of introducing competition in the industry; rather it is a highway to a new and further concentration of economic power.

5. *The Decree Gives the Defendants a Further Advantage by Allowing Them to Preempt Their Own Pictures.*

The program of auction bidding also imposes other competitive disadvantages on independents as against theatres owned by the defendants. Individual exhibitors will be

required to bid for every picture and can show only such pictures as they have obtained by successful bidding. The theatres owned by the defendants will not be under the same handicap. Rather, they will be free to take their own pictures and exhibit them without giving any independent an opportunity to obtain them. Under present conditions the defendants exhibit their own pictures for about 20% to 50% of the playing time in their own theatres. (R. 3687, 3688; Findings No. 135-138, 144). Under the bidding system they can, if necessary, extend the use of their own pictures substantially.

Furthermore, with a backlog of pictures of their own to assure them that their theatres are in no danger of standing idle, as are the theatres of the independents, the theatres owned by the defendants will be in a strong position to use the great financial power of their entire producer-exhibitor combination to bid for the best pictures of other producers and to pay higher prices than independent exhibitors can afford. Even the largest independent chains will have difficulty coping with the massed economic power of the majors.

6. The Hardships the Decree Will Impose on Independents.

The situation of the ordinary exhibitors is more precarious than that of the chain. He must have at least 104 pictures to keep his theatre running if he changes his bill twice a week. In subsequent runs, it is frequently essential that bills be changed three times and even more a week. In many places, such as Boston, Los Angeles, and New York, the public expects double features and with two or three changes a week, a theatre requires between 208 and 312 pictures a year. Competitive bidding will accentuate the struggle for product and strengthen the hand of the producer while further weakening the position of the exhibitor. A graphic example of the power given the majors can be seen in Lawrence, Massachusetts. The situation in that city can be duplicated in many other places,—Bayonne, New Jersey, Buffalo, New York, for example.

In Lawrence, Massachusetts, the Capitol is an independent theatre owned by one of your intervening petitioners. It is a first-run theatre operating in competition with four theatres owned by Warner Bros., two of which are first-run houses—one a move-over first-run house and one a second-run house. All of these theatres are larger than the Capitol theatre. At the present time the Capitol theatre is able to obtain sufficient quality product to operate. This is a result of well established business relationships and perhaps in part to the fear that any other course would subject Warner Bros. to the sanctions of the antitrust laws. Under a bidding system, however, the result would be that the massed buying power of Warner Bros. would deprive the Capitol theatre of first-run rights in all pictures which Warner Bros. felt had any chance of success. It would leave the Capitol theatre only those pictures believed fated to be failures. As a result the Capitol theatre would become a second-run house at best, and even on second-run the Capitol theatre could not compete with Warner's second-run house for the more desirable pictures produced by the defendants.

Competitive bidding will have a substantially similar effect where the individual independent exhibitor or small chain is in competition, not with a defendant-exhibitor, but with a large chain. For the buying power of a large chain would have the same effect as the buying power of the defendant exhibitor in depriving the independent of first-run product and leaving him only with such subsequent runs as the large chain could not use. This is an invitation to the extension of chains to the point of monopoly, a result not only not desirable under the antitrust laws but a result which it is the object of those laws to prevent. See *Interstate Circuit* v. *U. S.*, 306 U. S. 208; *U. S.* v. *Schine Chain Theatres, Inc.*, 63 Fed. Supp. 229 (W. D. N. Y. 1945), appeal pending, No. 10 this term.

The Court apparently believes that some of these objections which have been advanced against competitive bid-

ding would be removed by the provision that it may be that if is necessary "only where it is desired by the exhibitors." However this fails to take into account the fact that many exhibitors are affiliates of the defendants and that "where it is desired by the exhibitors" is the equivalent of "where it is desired by the defendants." Furthermore, even where a defendant-affiliated exhibitor is not the one who makes a request for such bidding, the defendants have sufficient influence even among independents as a result of the great power they possess over the business of each exhibitor that it would be an extremely simple matter in almost every competitive area for a request for competitive bidding to be initiated by an ostensibly independent exhibitor whenever the defendants so desired.

In this connection it is highly significant that every association of exhibitors of importance is opposed to the Court's program for auction bidding. They appeared before the court below and have appeared in this Court amicus curiae to protest. Likewise the Society of Independent Motion Picture Producers has filed its brief against the plan.

C. Under the Decree the Court Will be Under a Duty to Hear Complaints Arising From the Sale of Pictures Which Amount to a Pervasive Supervision of Details of Motion Picture Selling. Yet the Standards Determining the Best Bid Are so Vague and General that it Will Be the Defendants Who Actually Control the Administration of this Judicially Regulated Market.

It needs the citation of no authorities to support the proposition that courts should be reluctant to regulate the detailed operation of an industry under the guise of enforcing the antitrust laws. Yet such constant supervision of thousands of transactions relating to the sale of pictures would be necessary if the decree is to be any real protection against discrimination. There are so many factors which the court has indicated are proper considerations to deter-

mine the best bid that every transaction is a potential cause for judicial action.

Yet in administering the auction selling provision of the decree the court will in effect be compelled to accept the business judgment of the defendants on the question of whether they are actually accepting the best bids because the standards which determine the best bids are too vague and general to permit effective review. We have here that worst of combinations: unwarranted judicial interference, without the possibility of an effective judicial remedy.

Presumably the court thought that the highest bid system would prevent favoritism by the defendants toward individual buyers of films. The fact is that the peculiar character of the product sold will create new opportunities for favoritism under auction bidding. The sale of the right to exhibit a film in a theatre is not like the sale of an ordinary commodity. The factors which determine (under the court's plan) the best bid for the exclusive right to show the picture for a limited period of time are highly uncertain. Their relative value depends solely on a business judgment which cannot, as a practical matter, be reviewed unless it is so bad that it can be called arbitrary and capricious. There is the location of the theatre, the type of people who patronize it, the good will of the exhibitor in the community, the length of run which he offers, the clearance over other theatres, the time of exhibition, the type of exhibition, the ability of the exhibitor successfully to advertise the picture, and so on. The normal procedure of renting feature films for a percentage of the gross receipts adds other factors such as the size of the theatre. Where and how a picture will net the most money for a defendant who offers it for competitive bidding on all these factors is only a guess. Hence the court allows the defendants to reject all bids if it desires. Thus, the effect of the plan is to enable any defendant to favor any exhibitor, including affiliates of other defendants, and receive protection from the decree unless its business judgment is so

obviously bad it can be called capricious. In other words the decree sets up a defendant-controlled scheme of regulations for the industry.

For example the decree states that a picture is to be leased to "the highest responsible bidder." But "highest" depends upon a standard, and can be determined against dispute only if all offers are "spot" and for "cash." If the price is to be a percentage of the gross receipts of the successful bidder, in accordance with prevailing custom in the industry, the cash equivalent cannot be known until after the picture is shown. A procedure for commuting percentage of take into cash involves an advance estimate of the drawing power of the film. And the ordinary motion-picture is far too uncertain in its popular appeal to allow even an approach to precision. A minor complication is that the price of admission is for a composite of a feature, a comic, a news reel, and in certain localities a second feature, and expectations and receipts must alike be allocated between the offerings.

The "responsibility" of the bidder is likewise not beyond dispute. A minimum norm might be fixed and all exhibitors excluded from the bidding who did not measure up. But responsibility is usually a relative matter depending upon the importance or the value of the thing at stake. In respect to motion pictures it would seem reasonable to set different standards of responsibility for first, second, and third run exhibitors. If, however, that were done, the demand for responsibility would result in a classification of theatres. Or a bidder might be allowed to make up in responsibility for the deficit in his bid over that of his competitor. Nor can the question of by whom responsibility is to be judged be escaped. It is a common practice within the business community to allege the lack of responsibility of a party with whom one does not choose to deal.

A host of kindred questions attend the exact definition of the right which is being "sold." The right to show a picture is of little account; value derives from the character

and degree of exclusiveness with which the right is endowed. This is usually an affair of priority, length of run, period of clearance, and competitive area. And, since these privilege-making conditions have no common unit of measurement, a choice between bids will become largely an affair of someone's—presumably the seller's—unimpeded judgment. An escape from such caprice or favoritism can be effected only by a standardization of all the factors upon which the value of the franchise to show depends. Thus first, move-over, second, and other runs would have to be separately sold; the length of run and the period of clearance would have to be fixed; and the area within which no competitor would be permitted to put the picture on would have to be given precise boundaries.

Such a vast and intricate system of understandings and rules is utterly unsuited to judicial administration.

One example of the type of problem with which the court will be faced will suffice: An independent producer may have a picture of great drawing power. Under those circumstances advantage would lie rather in a longer run than a high percentage rental. In this view a bid for a one-month run at 25% is preferable to a bid for a one-week run at 40%, since the return would be much greater. Theatres owned by the defendants usually have adequate product and would be reluctant to agree to an extended showing while an independent exhibitor with inadequate product would be eager to have a long run. However, the independent producer is in most cases forced to release his product through a major distributor. It may be expected that the majors with their great number of theatres and their varying quality of product will arrange the bidding rules so that percentage rental shall be given greater weight than length of run in determining which is the highest bid. The probable result is that the independent producer will be required to lease his picture for the shorter period to a theatre owned by a major for one week rather than, as he desires, to an independent exhibitor who will give it a longer run. What

answer a court will give to this problem which will be a legal and expedient solution is difficult to know.

Since it is the intention that defendant's methods of selling be uniform, a single body of trade practices will standardize the factors, fixing the character and degree of exclusiveness of the right which is licensed. The rules of the game will be drawn for the assumed protection of the independent by the very parties who have been found guilty of discriminating against the independent.

D. Bidding is Unworkable in the Motion Picture Industry.

In many areas of the economy a system of bidding is a factor of importance in maintaining a competitive market. The markets for corn, wheat, cotton, and other "staple" commodities present the neatest illustrations. There the article is constantly in trade. A common unit makes measurement and comparison an exercise in mathematics.

But the motion picture industry lies far removed from this area. What the exhibitors have to offer is playing time which like labor cannot be held back during the bargaining process. What the producer offers is public entertainment, the value of which depends upon the type of audience and the kind of distribution, something which must be planned in advance to secure the maximum public acceptance of the offering. It makes no financial difference to the seller of wheat who buys it. But the question of who first exhibits a motion picture may be of paramount importance. Each picture may loosely be called a separate commodity. But even separate feature pictures cannot be sold as commodities are sold.

The thing, then, that is bought and sold is not the product of studio and factory. It is instead such a fraction of all-the-rights to show the film as the conventions of the industry decree. There are no obvious or natural answers to such questions as the area within which the licensee of a particular picture is to be protected against competition,

how long a period is to elapse before there is to be another showing in the neighborhood, what conditions must be satisfied to quality for first, second or third run. As the competitive area is enlarged and as the period of clearance is lengthened, the value of the license to show a feature picture is enhanced. As area contracts and time is shortened, the value of the license falls.

There can be under these conditions not even an approximate objective guide to sound business judgment in placing bids. The exhibitor is engaged in a continuous operation and must make secure his source of supplies for a whole season. Thus the price he can afford to pay for any picture depends upon the availability of other pictures he would like to show. If his business is to be kept going, he must find a substitute for the feature for which he strives and which he fails to get. No picture can be bought alone; his purchase is of a feature which has a distinctive place in a season's program.

A series of practical difficulties are certain to attend the operation of the system. An exhibitor, under the necessity of keeping his theatre going, is not going to limit himself to bidding for a single picture for a certain run. He will put in bids for a second, a third, or even a fourth choice, in case he is not successful on his first. There is likely to be a plague of overbidding with its attending confusions. If an exhibitor is successful in two or more bids, and can show only one picture, there must be a second contest or else a rule must specify who is to get the feature passed up. The handling of such difficulties will almost certainly result in the elaboration of a code. And the standards, procedures, rules making up the code are likely to prove so complicated as to overlay competitive bidding with a formal government of the industry.

It is, therefore, submitted that the conditions upon which the efficiency of competitive bidding is predicated do not exist in an industry so distinctive as motion-pictures. There is here no common unit by which product is to be

made commensurable. The output of the studios cannot be classified even by type. Without a common unit, a standardized product, an access to information, a market into which transactions are merged, competitive bidding, we submit, is unworkable in the industry.

E. Auction Selling Will Create Substantial Unnecessary Difficulties in the Operation of the Exhibitor's Business.

If in fact auction bidding showed substantial promise of alleviating the monopoly conditions in the motion picture industry, there might well be justification for the unsettling of trade practices which have developed through the years. But since competitive bidding will serve no such beneficial purpose, the revolutionary changes which it will make in the business of exhibitors are further reasons why such a system should not be attempted. We shall briefly catalog such changes.

(a) At present most exhibitors have access to film and can schedule pictures sufficiently in advance to be assured that their theatre will be in continuous operation throughout the year. The new system will create uncertainty as to the availability of pictures. Independent exhibitors will be required to bid on every picture which is offered which they do not affirmatively feel would be unprofitable. They will have to bid for substantially more than they need because there is no assurance of what will be available to them. They will operate on a feast or famine system which in the case of independent exhibitors, as we have seen, will be more famine than feast. During the periods when they are unable to bid enough to obtain the pictures they desire they must close, show inferior product, or accept later or last run showings.

(b) At the present time the purchasing of film is time consuming but of manageable proportions. Under the proposed new system, judgments would have to be made as to each picture and separate bids made on those pictures.

It would require the hiring of additional personnel able to handle the great burden of administrative detail and judgment which can be expected to result from the bidding system. This might well be prohibitive when added to the higher cost of pictures under a competitive bidding system.

(c) Present trade practices are fairly well crystallized. Under the new system, hundreds and hundreds of disputes may be expected on the issues mentioned above, i.e., responsibility, competitive area, highest bid, proper size and equipment. This will be not only confusing but expensive.

(d) At present pictures whose value is in doubt often are sold without a fixed arrangement as to the lease rental. Others which make a disappointing showing result in an adjustment by agreement under which the distributor rebates part of the rental. Under the bidding system neither of these procedures would be possible because open pricing is specifically forbidden and adjustment might result in a final payment of rental less than the amount bid by the next highest bidder.

(e) The emphasis on price and the highest bidder will tend to concentrate desirable runs in the larger theatres with higher admission prices and shorter shows, thus decreasing the amount of entertainment which the consumer obtains for his dollar.

(f) Competitive bidding will impair the effectiveness of the exhibitor's function in the community. The exhibitor has the distinctive function of offering entertainment to the people of his area. It is his task to study, to cater to, and even to elevate the taste of his community. Such an endeavor cannot be realized by securing his pictures one by one through competitive bidding. Instead of a hand to mouth procedure, he must look ahead, select his offerings in terms of his distinctive needs and fit the items into a program. To neither exhibitor nor producer is the best bargain item by item as advantageous as playing for long-

time and enduring gains. It is never good policy to make price alone the guide to business judgment. A good will, which requires a long-time vision, is to be built up. As the exhibitor must never forget his distinctive audience, so his interest commands that he should look ahead to make secure his source of supply. The motion picture exhibitor, in his concern for features, is not to be denied a precaution which is elementary to the automobile manufacturer in respect to steel and to the steel manufacturer in respect to coal and iron.

CONCLUSION.

The issue presented by this intervention is the effectiveness of the competitive bidding procedure for the objectives of the anti-trust laws and the evils found to exist by this Court. The evils found to exist are a combination by the defendants to exclude independent exhibitors from preferred runs to the advantage of their own controlled or affiliated theatres. To meet that situation the Court has devised an assumed remedy by competitive bidding. We have shown that the remedy will not be effective; that it will strengthen the defendants who are already strong and pit the weak independents against each other for the benefit of the defendants. It would give new and unprecedented powers to regulate the industry to the major defendants. Free of present restrictions due to business morality and immune from prosecution under the anti-trust laws, it creates a highway to greater concentration in monopoly

and erects even greater barriers to the entry of independents into the business or to their progress to the place to which they are entitled in a free competitive society.

Respectfully submitted,

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